

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NETLIST, INC., (CAUSE NO. 2:21-CV-463-JRG
)
Plaintiff, ()
vs. ()
SAMSUNG ELECTRONICS CO., LTD., ()
et al., () MARSHALL, TEXAS
(MARCH 29, 2023
Defendants.) 9:00 A.M.

VOLUME 2

PRETRIAL CONFERENCE
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES CHIEF DISTRICT JUDGE

SHAWN McROBERTS, RMR, CRR
100 E. HOUSTON STREET
MARSHALL, TEXAS 75670
(903) 923-8546
shawn_mcroberts@txed.uscourts.gov

1 hours by email to my staff.

2 MR. CORDELL: Just for clarity, Your Honor, we're
3 not getting into the who shot John.

4 THE COURT: I don't see any probative value in doing
5 that.

6 MR. CORDELL: Excellent. Thank you.

7 THE COURT: This is, in effect, a limited exception
8 to MIL 13 simply because I think it's pretty clear that this
9 document is going to be, if not a central part, a material
10 part of the evidence in the case.

11 MR. SHEASBY: I'll just flag, this is not their
12 non-willfulness interrogatory response.

13 THE COURT: Let me say this again, counsel. You
14 submit to me what you want. I'll look at it. I'll instruct
15 the jury to a level that I think is appropriate. If you want
16 to go into this topic beyond what I am going to instruct the
17 jury on, you're going to have to approach leave and convince
18 me to grant leave.

19 MR. SHEASBY: I understand, Your Honor.

20 MR. CORDELL: Understood, Your Honor.

21 THE COURT: That is Plaintiff's MIL No. 3, which
22 technically I'm going to deny because it's already subsumed
23 by standard MIL No. 13.

24 Let's take up Plaintiff's MIL No. 4. This seeks to
25 preclude Samsung from presenting any evidence that Netlist

1 has failed to comply with JEDEC obligations.

2 All right. Mr. Cordell, what's the Samsung objection
3 here?

4 MR. CORDELL: With your permission, Your Honor,
5 Mr. Mosteller will present our arguments.

6 THE COURT: That's fine.

7 MR. MOSTELLER: Thank you, Your Honor.
8 Mr. Mosteller for Samsung.

9 And I think that Your Honor has already decided
10 Plaintiff's MIL No. 4 several times over the past couple of
11 days with reference to other JEDEC discussions and Netlist's
12 relations with JEDEC and the scope of what Samsung will be
13 able to present at trial with respect to that relationship.

14 Here, Your Honor, we're dealing with Netlist's
15 obligations to disclose things to JEDEC. The fact that JEDEC
16 was sitting in on the meetings--I'm sorry--that Netlist was
17 sitting in on the meetings at JEDEC, was silent despite its
18 obligations to disclose patents is highly relevant. It's
19 relevant to whether Samsung knew about the patents, it's
20 relevant to whether Samsung or Netlist thought that products
21 that practiced these standards were implicated by these
22 patents, and it's relevant to Netlist's perception of these
23 patents to products that practice those standards, Your Honor.

24 THE COURT: Mr. Sheasby?

25 MR. SHEASBY: Sure.

1 These patents are not standard essential. There's no
2 obligation to disclose a patent that's not standard essential.
3 There's no allegation from a legal -- in front of the jury
4 that goes to whether we complied with our obligations to
5 JEDEC, because we have no obligations to JEDEC because they're
6 not essential. The MIL should be granted.

7 If there's some narrow exception to talking about the
8 relationship with JEDEC, they should seek leave to approach.
9 But on its face that we failed to comply with JEDEC
10 obligations, that's a reasonable MIL. There is no allegation
11 in front of the jury that we haven't failed to comply with our
12 JEDEC obligations. It's not pled in the complaint. It's not
13 pled in the affirmative defenses.

14 THE COURT: All right. In regard to Plaintiff's MIL
15 No. 4, I'm going to grant this MIL, but I want the parties to
16 understand why I'm doing it. I'm granting it so that the
17 Court can be an active gatekeeper on what does and doesn't
18 come in before this jury about JEDEC. I have a fear that
19 without any constraints there's going to be confusion created,
20 especially in light of the fact that these are not standard
21 essential patents, and there are not obligations under JEDEC
22 because they're not standard essential patents submitted to
23 this standard setting body. But there may be relevant use of
24 JEDEC and there may be implications that relate to other live
25 issues in the case.

1 And, quite honestly, I don't trust either side to hew the
2 proper line without me being a gatekeeper here. So I'm going
3 to grant it. That doesn't mean there's not going to be any
4 mention of it during trial; it's going to be that I'm going to
5 get to supervise and provide oversight for what's mentioned
6 how it's mentioned in real-time. Okay?

7 MR. MOSTELLER: Thank you, Your Honor.

8 THE COURT: All right. Plaintiff's MIL 4 is granted
9 with that explanation.

10 Plaintiff's MIL 5 seeks to preclude Samsung from
11 introducing evidence that practicing the standard is a defense
12 to infringement or willfulness.

13 What's the dispute here, Mr. Cordell? These are not
14 standard essential patents.

15 Well, whoever's speaking for Samsung. I have to look up
16 if I'm going to notice who's at the podium.

17 MR. LIVEDALEN: Thank you, Your Honor. Brian
18 Livedalen for Samsung.

19 So this issue's slightly different. I think it comes in
20 the most clarity here with respect to willfulness. So
21 Samsung, being a member of JEDEC and being a company that
22 practices a standard, relies on the disclosures we talked
23 about. Netlist has an obligation also as a member to disclose
24 patents that it believes may be standard essential. And so
25 Netlist for its willfulness case is going to rely on the

1 disclosure of related patents as evidence that Samsung knew of
2 those patents and knew that it was infringing.

3 In rebuttal --

4 THE COURT: Wait a minute. Infringing related
5 patents and not the patents-in-suit?

6 MR. LIVEDALEN: I should clarify. Infringing the
7 patents-in-suit simply by disclosure of related patents.

8 THE COURT: Say that again.

9 MR. LIVEDALEN: Sure.

10 THE COURT: You believe the Plaintiff's going to
11 show infringement of the patents-in-suit by Samsung because
12 Samsung may have disclosed other patents to JEDEC but not
13 these patents?

14 MR. LIVEDALEN: So Netlist --

15 THE COURT: I'm trying to follow you.

16 MR. LIVEDALEN: Yeah, sure.

17 Netlist is going to argue that the disclosure of parent
18 patents, for example, to the '918 and '054 Patents put Samsung
19 -- gave Samsung the requisite knowledge of the '918 and '054
20 Patents. They may also argue that the disclosure of a parent
21 patent, for example, and the disclosure to that patent was
22 standard essential; also provided Samsung with knowledge or an
23 intent that it is somehow infringing the '918 and '054
24 Patents.

25 And so what Samsung would like to do in response is to

1 say that JEDEC members rely on what is disclosed, but they
2 also rely on what is not disclosed. So the fact that there
3 was never a disclosure of the '918 and '054 Patents as
4 standard essential is something that they can rely on for no
5 willfulness.

6 THE COURT: Okay. Maybe that's where the confusion
7 lies. I can see the nexus with the willfulness issue. I
8 don't see the nexus with the underlying infringement issue.
9 The jury's going to determine infringement by comparing the
10 claims -- the elements of the asserted claims to the accused
11 products; no more, no less.

12 But beyond the determination of infringement, I do see
13 what you're arguing with regard to willfulness. I thought you
14 were arguing with regard to infringement. Maybe you are. I
15 don't see the connection on the infringement --

16 MR. LIVEDALEN: The issue I just argued, Your Honor,
17 is with respect to the willfulness issue.

18 THE COURT: Okay.

19 MR. LIVEDALEN: With respect to infringement, we're
20 not going to argue that practicing the standard alone
21 immunizes Samsung from infringement. I think that's what the
22 gist of MIL No. 5 is asking. But we do want to present
23 evidence that Netlist seeks to argue that its patents are
24 simultaneously infringed and not essential, and that argument
25 that Netlist is going to present at trial is inconsistent with

1 statements that Netlist made both to the Court in its original
2 complaint and positions that it made in its interrogatory
3 responses.

4 THE COURT: Well, if you want to attempt to impeach
5 a witness for the other side, you can attempt to impeach them,
6 but that doesn't really move the needle on whether I ought to
7 grant or deny this motion in limine.

8 MR. LIVEDALEN: Yes, Your Honor. That's the one
9 point with respect to infringement; again, but we're not going
10 to argue that simply practicing a standard immunizes us from
11 infringement.

12 THE COURT: Okay. Mr. Sheasby, the allegation is
13 that you're going to try to show willfulness here because
14 either Samsung knew these were essential and refused to submit
15 them to the standard, or somehow as being involved with the
16 standard Samsung knew about -- I mean, knew about this
17 technology and hid it from the standard body. Respond to that
18 somehow for me.

19 MR. SHEASBY: Sure.

20 So two issues. One, willfulness is a state of mind.
21 What you just heard is a creation of the very able lawyers who
22 are representing Samsung. We took a 30(b)(6) witness on
23 willfulness. We have an interrogatory on willfulness. None
24 of what you just heard has been disclosed anywhere in fact
25 discovery. And so they're going to be constrained by what

1 they say in fact discovery.

2 So if their corporate representative gets up and says,
3 Oh, we're shocked, we're shocked because it wasn't in JEDEC,
4 I'm going to approach the bench show, I'm going to show that
5 it's not in any discovery response that they gave us, it
6 contradicts what they said, and then I'm going to ask for it
7 to be stricken. That's the first issue.

8 The second issue is that we don't intend to say that
9 these patents are essential and, therefore, the issue that --
10 this convoluted theory that they're spinning -- that we're
11 spinning to is not one that I think is going to be -- even
12 open the door.

13 But I think the thing to do is not to debate it. The
14 MIL should be granted. If they have some convoluted theory
15 that they want to try to present because they think the door's
16 been opened, they should approach and they can discuss that
17 theory with the Court.

18 That's my response.

19 THE COURT: What else from Samsung?

20 MR. LIVEDALEN: So one thing, Your Honor.

21 Mr. Sheasby faults Samsung for not providing an adequate
22 interrogatory response, but all that Netlist put in its --

23 THE COURT: You know, counsel. We are awful late
24 in the day for me to be hearing about discovery disputes. I
25 mean, we cannot spend the entire trial with each of you

1 pointing fingers and casting accusations at the other for
2 failing to do their job a year and a half ago as this case
3 was being developed and discovery was begun and pursued.
4 That's disconcerting for both of you to be focusing on old
5 discovery failures. The time for addressing those is long
6 gone. We did have a raft of motions to compel in this case.
7 I've dealt with them as best I could, but I'm growing weary of
8 hearing about discovery disputes.

9 MR. SHEASBY: Your Honor, I think it's reasonable.
10 This is not a discovery dispute. They did answer the
11 interrogatory. They should be constrained by what the answer
12 was.

13 THE COURT: Well, let me say this. To the extent
14 Samsung might be tempted to communicate to the jury that by
15 practicing the standard they're somehow being immunized from
16 an infringement allegation, I think that's improper. And even
17 though Samsung says they're not going to do this, to that
18 extent I'm going to grant this MIL.

19 Willfulness is a totality of the circumstances, as the
20 Supreme Court's made clear. I don't think there's a basis
21 upon which I can keep the Plaintiff from addressing the
22 standard setting body and Samsung's participation in it with
23 regard to the willfulness issue.

24 I'm going to grant it as to precluding the Defendant from
25 trying to defend against infringement on the basis of

1 practicing the standard, but in other regards -- any other
2 regard I'm going to deny the motion.

3 MR. LIVEDALEN: Thank you, Your Honor.

4 THE COURT: Okay. Let's go to Defendant's disputed
5 motions in limine. The first one seeks to prevent improper
6 argument or evidence regarding Samsung's alleged failure to
7 supply memory to Netlist.

8 What's Plaintiff's objection with Defendant's MIL No. 1?

9 MR. SHEASBY: There will be no discussion of the
10 damages associated with the breach, or lack thereof, but the
11 story of the behavior between Samsung and Netlist goes
12 directly to the willfulness allegations in the case.

13 If we can have the PX Indong Kim exhibit, Mr. Huynh.

14 THE COURT: And the breach you're talking about is
15 what gave rise to the termination?

16 MR. SHEASBY: That's correct; the cutting off of our
17 supply.

18 So what the record will show is that in June of 2016, as
19 we were getting ramped up and asking for them to increase our
20 supply --

21 Scroll down. Scroll down some more.

22 -- the Samsung entities had what is described as a right
23 of first refusal to our patents, which means that if we went
24 bankrupt we would have to give them our patents.

25 Scroll down more.